IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO. 635 OF 2003.

M/s.Todkar Group. ... Appellant.

V/s.

1. Bhapkar Petrol Depot,

2. Smt.Mrinalini Laxman Gadve,

3. Shri Morappa alias Yuvaraj
   Laxman Gadve,

4. Municipal Corporation of
   the City of Pune,

5. The Municipal Commissioner,
   Municipal Corporation of
   the City of Pune,

6. The City Engineer,
   Building Control Department,
   Municipal Corporation of
   the City of Pune,

7. Bharat Petroleum Corporation
   Ltd.

8. The Veer Shaiv Co-op.
   Bank Ltd. ... Respondents.

P.K.Dhakephalkar for the appellant.

N.V.Walawalkar with S.A.Sawant and H.V.Kode
for respondent No.1.

Amol Mhatre for respondent Nos.2 and 3.

R.G.Ketkar for respondent No.4 to 6.

S.G.Page for respondent Nos.7.

Jaydeep S. Deo for respondent No.8.

CORAM: V.C. DAGA, J.

DATE : 19th August 2004.

P.C.:

. Heard.

. Appeal is finally heard by consent of parties at the stage of admission. Perused memo of appeal and the documents produced by the parties.

2. This appeal is directed against the order dated 1st July, 2003 passed by the 5th Joint Civil Judge, Senior Division, Pune below Exh.12 in Special Civil Suit No.923 of 2002, whereby the trial Court partly allowed application (Exh.12) and directed defendant Nos.1 t 3 to remove the small stair case with few steps allegedly having its opening in the suit property.

The Facts :
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3. The facts giving rise to the present appeal, in nutshell, are that a partnership firm known as M/s.Bhapkar Petrol Depot, filed suit for declaration and injunction in respect of the property described in para 1(b) of the plaint ("suit property" for short).

4. The suit property described by measurement admeasures 800 sq.mtrs. In the suit,

plaintiff sought declaration that defendant No.1/ appellant herein; does not have any right, title and interest in respect of suit property and also prayed for permanent injunction. An application for injunction (Exh.12) came to be moved to seek mandatory direction to remove the stair cases.

5. The trial Court after hearing the parties to the injunction application was pleased to direct removal of the stair cases holding that they opened on the suit property of the plaintiff as such they need to be removed. This order is a subject matter of challenge in the present appeal from order.

Events in Appeal :
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6. On 6th October, 2003, when this matter was placed before learned single Judge of this Court (Kanade, J.) for motion hearing, on the suggestion of the Court, learned counsel for the appellant agreed to remove stair cases within one week. Accordingly, the stair cases were removed. By the same order, learned single Judge was pleased to direct D.I.L.R./T.I.L.R. to carry out measurement of the disputed properties after giving notice to the plaintiff and defendant Nos.4 and 7 and called upon him to submit his report to this Court within four weeks. Accordingly, the report along with map has been placed on record of this

appeal.

7. With the above events and material on record, parties to the appeal were heard. They made their respective rival submissions.

Consideration :
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8. Having heard rival parties, one thing is clear from the survey report and the map produced on record by the City Survey Officer that the land admeasuring 569 sq.mtrs is in possession of the plaintiff, who is running business of petrol pump. It is not in dispute that the land claimed to be in possession of the plaintiff, as per plaint pleadings by measurement, is about 800 sq.mtrs. It is also not in dispute that the plaintiff therefrom has lost land admeasuring 392 sq.mtrs. in view of the acquisition for the purposes of road widening. If acquired portion of land is subtracted from the total holding of the plaintiff i.e. 800 sq.mtrs., then, plaintiff could only be left with land admeasuring about 408 sq.mtrs. But, factually, plaintiff appears to be in possession of land admeasuring 569 sq.mtrs. as reflected in survey report and the map drawn by T.I.L.R. submitted to this Court. Therefore, prima facie; it appears that the land in possession of the plaintiff is much more than what should have been in its possession.

9. In the above scenario, firstly, it is necessary for the plaintiff to establish which part of the plot of land is the suit property which they are holding in their own right. They will have to get the suit property demarcated, may be with the assistance of the Court. Secondly, it would be necessary for the appellant/ defendant No.1 to find out how the plot area has increased or how they came in possession of the increased area. Thirdly, they will have to get their plot of land measured and demarcated. After measurement and demarcation thereof, if it is established that the plaintiff is in possession of the area larger than the area to which they are entitled in their own rights, then, the question which would need consideration is to what extent and from which side of the plot the area has increased. After ascertaining factual position prevailing on the spot, trial Court will have to consider whether the opening of the stair cases are in the increased or extended area or in the area which the plaintiff is holding in its own right.

10. In the above premise, the question for consideration would be whether or not plaintiff is entitled to claim an equitable relief of injunction. If the stair cases, which were constructed, were found to be not having opening on

the area or plot of land leased out to the plaintiff, in that event, second question for consideration would be: whether the existence of such stair cases can be objected by the plaintiff. Thirdly, can there be an order directing removal of the such stair cases by mandatory interim order. However, as the things developed, as on date, the staircases are not in existence; in view of removal thereof. The plot of land possessed by the plaintiff has not been demarcated. It needs to be demarcated together with the property of defendant No.1 to enable the trial Court to address itself on the above questions. All these questions can be considered and decided only after proper demarcation of the suit property. As a matter of fact, without getting the suit property demarcated, the trial Court should not have passed mandatory interim order which is required to be passed in rare cases.

11. In the above backdrop, impugned order will have to be quashed and set aside and the matter will have to be remitted back to the trial Court for consideration afresh in the light of the observations made herein. It is, thus, made clear that after demarcation of the suit property, if the stair cases, which were constructed, as per the sanctioned plan, are found not to have their opening on the suit plot of land held by the

plaintiff on lease, then it would be open for appellant/ defendant No.1 to re-construct the stair cases as per sanctioned plan otherwise different consequences would flow.

12. Mr.Ketkar, learned counsel for the Pune Municipal Corporation states that the Corporation shall have no objection, if after demarcation of the respective plots, the defendant No.1 decides to re-construct the stair cases subject to the orders on Exh.5. In that event, no fresh permission of the Corporation shall be necessary.

13. In the light of the above discussion, it would be open for the plaintiff to apply for measurement of its own plot along with plot of defendant No.1. It would be open for the trial Court to consider such prayers, if made in its proper perspective in the light of the observations made herein. However till such time, parties to the suit shall maintain status- quo.

14. In the above view of the matter, the impugned order is quashed and set aside. Application (Exh.12) stands restored to file. The same is remitted to the trial Court for consideration afresh.

. In the result, appeal is allowed in terms of this order with no order as to costs.

15. All the concerned to act on ordinary copy of this order duly authenticated by the Associate/ Personal Secretary of this Court.

. Issuance of certified copy is expedited.

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